***THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY**

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WRIT PETITION NO. 17605 of 2005

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% 21.10.2005

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Between:

Kushal Industries, rep. by its Proprietor Sri Kunal Kumar.

... PETITIONER

AND

The Vice Chairman & Managing Director, AP State Civil

Supplies Corporation Ltd., Somajiguda, Hyderabad & others.

...RESPONDENTS

! COUNSEL FOR THE PETITIONER: Sri Vilas V.Afzalpurkar

^ COUNSEL FOR THE RESPONDENT Nos.1&2: D.Linga Rao,

Standing Counsel

COUNSEL FOR THE RESPONDENT No.3: Mr.L.Prabhakar Reddy

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> Head Note:

? CITATIONS:

1. 2005(4) Supreme 215

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O R D E R:

The petitioner is a proprietary concern, undertaking the activity of transport. Andhra Pradesh State Civil Supplies Corporation, the 1st respondent, hereinafter referred to as "the Corporation", is a State Agency, entrusted with the functions of supply and distribution of essential commodities in the State, particularly, to the Fair Price Shops. The Corporation issued a tender notice dated 25.6.2005, inviting tenders for assigning the contract of transporting the essential commodities, from various godowns to the Fair Price Shops in various districts. The petitioner submitted its tender in relation to the transporting of essential commodities in Adilabad District, along with few others.

Through its order dated 29.7.2005, the Corporation assigned the contract in favour of the petitioner, by treating the offer at Rs.7/- per Metric Tonne, for 16 K.Ms. and Rs.3/- per Metric Tonne, for each kilometer, beyond 16 KMs. The petitioner assails the said order, by contending that the offer made by it for the first 16 K.Ms. was Rs.7/-, per Metric Tonne, per Kilometer, and not for the entire distance of 16 K.Ms. The petitioner alleges that the action of the Corporation, in assigning the contract with the above said rates, is contrary to the offer made by it, as well as the contents of the tender notice. It seeks a declaration to the effect that the impugned order is illegal, arbitrary and unenforceable in law, and seeks direction to the Corporation to act on the basis of the letter, dated 29.7.2005 addressed by it. During the pendency of the writ petition, the Corporation cancelled the impugned order and awarded the contract in favour of the 3rd respondent.

Petitioner contends that the conditions incorporated in the tender form, particularly with reference to the units for which rates are to be quoted, are uncertain and inconsistent, and when the same was noticed, it has submitted as many as three representations, making it clear that the rate quoted by it, with reference to 16 KMs distance is per Metric Tonne, per Kilometer, up to that distance, and not for the entire distance of 16 KMs. Petitioner urges that in spite of such representations and oral submissions during the negotiations, the Corporation proceeded to pass the impugned order, with an ulterior motive.

On behalf of the Corporation, a counter affidavit is filed by the General Manager (PDS). It is stated that the tender notice was very clear, providing for two systems of quotation of rates, *viz*. System I & System II, and when System II provided for the flat rate for the distance of first 16 K.Ms., per Metric Tonne, there was no

justification for the petitioner to take the same as the one for per Metric Tonne, per Kilometer. It is stated that once the petitioner had quoted the rates in the tender, he cannot go back on the same, that too, after the contract was awarded. Reference is made to the clauses of the tender notice and the subsequent order dated 18.8.2005, through which the proceedings dated 29.7.2005 were cancelled, E.M.D. of the petitioner was forfeited, and the petitioner was blacklisted. They seek to justify the assignment of contract in favour of the 3rd respondent.

The 3rd respondent filed a counter affidavit, narrating the circumstances under which he came to be assigned the contract. He contends that the writ petition is not maintainable and that the decision taken by the Corporation is final. He repeated the contentions advanced on behalf of the Corporation, and submits that the petitioner does not have any right to assail the impugned order.

Sri Vilas V.Afzalpurkar, learned counsel for the petitioner, submits that the Corporation introduced two systems of tendering, and that there is any amount of confusion and overlapping in the same. He contends that the petitioner, as well as another tenderer, understood that under both the systems, the rates are to be quoted per kilometer, per Metric Tonne, in all the items, and when the petitioner realized that for item No.1 in system II the Corporation intended that it should be a flat rate for 16 KMs, written representations were made, clarifying his position. Learned counsel submits that whatever may have been the basis for the petitioner to quote the rates, per Kilometer, in all respects, in the tender, once he has clarified his position during the course of negotiations, there was no justification for the Corporation in passing the impugned order. Learned counsel points out that even while the present writ petition was pending, the Corporation issued proceedings dated 18.8.2005, not only canceling its tender, but also forfeiting the EMD of Rs.2,50,000/- and blacklisting the petitioner.

Sri D.Linga Rao, learned Standing Counsel for the Corporation, submits that the conditions in the tender are very clear and unambiguous, and that the Corporation is justified in accepting the tender of the petitioner, strictly in accordance with the conditions of the tender notice. He contends that the representations made by the petitioner are an afterthought, and he cannot relieve himself from the offer made by him. Learned counsel points out that the Corporation has absolute

discretion in the matter of acceptance or rejection of tenders, and that the same cannot be questioned. He contends that the proceedings dated 18.8.2005 were issued, on account of the failure of the petitioner in executing an agreement and complying with other conditions. He submits that the terms and conditions of a tender notice are not amenable to the judicial scrutiny, and that a writ petition is not maintainable to adjudicate the matters, which are in the realm of contract.

Sri L.Prabhakar Reddy, learned counsel for the third respondent, had supplemented the arguments of Sri D.Linga Rao, learned Standing Counsel for the Corporation. He contends that the rates quoted by the third respondent were the next least, after those quoted by the petitioner, and pursuant to the acceptance of his offer, an agreement was executed and the contract is being operated.

With a view to award the contract for transporting the food grains and essential commodities, from godowns to Fair Price Shop points, the Corporation issued tender notice dated 25.6.2005, for all the districts in the State. The last date for submission of tenders for the District of Adilabad was 14.7.2005, and on the same day, the tenders were scheduled to be opened. The petitioner and seven others submitted their tenders, for Adilabad district. The Corporation introduced two systems of quotation of rates for the contract. The relevant conditions read as under:-

> "**Condition No.7:** Rates should be quoted per Metric Tonne per Kilometer in flat rate. Rates should not be quoted in fractions of paise. If the distance traveled is 90 KMs, the transport charges per MT will be calculated as follows.

For 90 KMs. ……. Rs.1.56x90x1 = Rs.140.4

> **Condition No.8**: Tenderers should also quote rate as per earlier Escom System i.e. rate per MT upto 16 KMs (Flat Rate) and rate per MT per KM beyond 16 KMs."

In the tender form, the relevant columns were provided as under:

"**System I**:

Rate per Metric Tonne, per Kilometer, irrespective of distance.

System II:

Rate per Metric Tonne, per Kilometer, for the slabs mentioned below;

1. Upto 16 KMs, per Metric Tonne (Flat Rate)

2. Beyond 16 KMs., per Metric Tonne, per Kilometer."

It is not necessary to refer to the rates quoted by all the tenderers. It would be sufficient to refer to those quoted by the petitioner and the third respondent, which are as under:-

	System-I Rs. Ps.	System-II---------- -Upto 16 K.Ms Beyond 16 KMs. Per M.T. Per MT/KM Rs. Ps. Rs. Ps.
Kushal Industries (Petitioner)	4-10	7-00 3-25
Sai Reddy Kantha Reddy (3rd respondent)	10-00	505-00 15-00

As provided for under the tender notice itself, the Corporation undertook negotiations with all the tenderers. It is during the negotiation, undertaken soon after the opening of the tenders, that the petitioner realized that the rates quoted by him for item No.1 of System II were being treated for the entire distance of 16 K.Ms, whereas, he intended the same to be per Metric Tonne, per Kilometer. Soon thereafter, he submitted a representation, dated 16.7.2005, stating that he understood the relevant entries in the tender form as meaning that for all items, rates are to be quoted per Kilometer, per Metric Tonne, and that he quoted Rs.7/- per Kilometer, per Metric Tonne, up to 16 K.Ms, as was the practice in the previous year. He pointed out that if it is to be treated as the one for entire distance of 16 KMs, it comes to Rs.112/-, and requested the Corporation to take the same into account. Thereafter, a second round of negotiations has taken place. The petitioner submitted another representation dated 23.7.2005, reiterating the one dated 16.7.2005.

After the second round of negotiations, the Corporation issued proceedings dated 29.7.2005, accepting the tender of the petitioner in System II, as Rs.7/- per 16 KMs, flat, per Metric Tonne, and Rs.3/- for each kilometer thereafter. As soon as he received this, the petitioner submitted another representation dated 5.8.2005, narrating that the rate quoted by him for System II was per Kilometer, per Metric Tonne. He has also urged that in case, the rate is treated as the one for 16 KMs flat,

it would work out to 60% less than the previous year's rates. When his request was not acceded to, he filed the present writ petition.

This Court passed an interim order, directing the Corporation to dispose of the representation, dated 5.8.2005, submitted by the petitioner. Subsequent to this, the Corporation issued proceedings dated 18.8.2005, referring to the various representations made by the petitioner, and ultimately cancelled the contract on the ground that the petitioner failed to enter into the agreement within the stipulated time, forfeited the EMD of Rs.2,50,000/-, and the petitioner was blacklisted from participating in the tenders of the Corporation, in future.

It is true that the interference with the tendering process and award of contracts is very rare in the writ petitions. However, a distinction is to be maintained between the stage, preceding the award of contract by a public authority, and the stage subsequent thereto. While the rights and obligations of the parties in relation to the latter have to be worked out, in accordance with the terms of contract mostly in a Civil Court or through Arbitration, the High Court can certainly exercise its jurisdiction under Article 226 of the Constitution of India, to ensure fairness, transparency and reasonableness in the first stage. One does not have to look much, for the authorities, on these aspects. At the same time, the High Court cannot alter the terms of tendering, nor can it adjudicate the reasonableness thereof. Reference may be made to the judgment of the Supreme Court in ***GLOBAL ENERGY LTD. & ANOTHER V. M/S.ADANI EXPORTS LTD. & OTHERS***. It is in this background that the matter needs to be examined.

A perusal of the relevant columns in the tender form, which are extracted in the preceding paragraphs, discloses that there exists certain amount of ambiguity in understanding the item No.1 of System II. The heading assigned to system II gives scope for it, to be taken in more ways than one. The expression "per Metric Tonne, per Kilo Meter, for the slabs" gives clear scope for an ordinary individual to understand that for the distances up to 16 KMs, as well as those beyond it, the rates are to be quoted per Metric Tonne, per Kilo Meter. Adding the words "flat rate" underneath the expression "up to 16 K.Ms, per Metric Tonne", is hardly sufficient to

clear the ambiguity or confusion. At any rate, things would have been totally different, had the Corporation has clinched the contract, on the basis of the rates that are quoted in the tenders, by various individuals.

It is a matter of record that soon after opening the tenders, the Corporation invited all the tenderers, including the petitioner and third respondent, for negotiations. The petitioner made his stand very clear through his representation, dated 16.7.2005. He stated that the rate quoted by him, against the distance of 16 K.Ms in System II is, per Metric Tonne, per Kilo Meter, and if it is to be taken as the flat rate for 16 K.Ms, it would be Rs.112/-. The contract was not finalized, even after the first round of negotiations. The Corporation undertook the second round of negotiations on 29.7.2005, by issuing a telegram and letter dated 23.7.2005. By this time, the rates quoted in the tenders virtually became irrelevant, and the basis for award of contract was to be the rates to be offered during the course of next round of negotiations. The letter reads as under:

> "Please refer to your Tender dated 15.7.2005 for transportation of food grains to the District of Adilabad for the year 2005-2006 and negotiated rates offered on 16.7.2005. It has been decided to conduct re-negotiations on 29.7.2005 at 11 A.M. Therefore, you are requested to attend for re-negotiations on 29.7.2005, without fail. Otherwise, it will be construed that you are not interested to reduce rates further and rates quoted earlier hold good and Corporation takes its own decision on the rates available. No further correspondence will be entertained in this regard."

On receipt of this intimation, the petitioner submitted a representation, dated 23.7.2005, making his stand clear as under:

> "As per the heading given in the Form, the rates, which I have quoted upto 16 Kms. as Rs.7/- per Km/MT. Similarly for beyond 16 kms, I have quoted Rs.3.25 ps, Km/MT. At the time of negotiations, we have realized that the Corporation is taking it as Rs.7/- for 16 kms per MT, which interpretation is wrong as the tender form itself clearly mentions that rate quoted in Rupees per MT/KM for the slabs mentioned. Therefore, our tender has to be treated as upto 16 KMs as Rs.7-00 per MT/KM only, as the form itself is defective, we cannot be penalized and it is most uneconomical proposition which cannot be worked out in any manner in the annals of transportation of food grains in any District by anybody. The tender may please be considered accordingly."

As observed earlier, once it has been decided by the Corporation to negotiate the rates, those quoted in the tender, lose significance. In fact, the parties who participated in the negotiations and offered different rates, get relieved from the obligation to accept the contract at the rates quoted by them. Since the Corporation has undertaken two rounds of negotiations, there does not exist any basis for it to adhere the rates stipulated by the parties in their tender forms. Still, the Corporation passed an order dated 29.7.2005, awarding the contract to the petitioner, by taking the rates quoted under System II, into account, ignoring the clarification given by him. For the distances up to 16 K.Ms., it took the figures quoted in the tender, and for the distance beyond 16 KMs, it took those quoted by the petitioner during the second round of negotiations. It is interesting to note that the representations dated 16.7.2005 and 23.5.2005 submitted by the petitioner, were either referred to, or taken into account. Soon after this, the petitioner recorded his protest, through another representation dated 5.8.2005.

After this court passed interim order on 10.8.2005, the Corporation issued proceedings dated 18.8.2005. In this, no reference is made to the orders of this Court. All the three representations of the petitioner were referred to, and their contents were noted. Conditions 14, 16 and 29 of the tender were invoked, and the Corporation cancelled the contract, apart from forfeiting the EMD and blacklisting the petitioner.

Condition No.14 disables a tenderer from withdrawing his offer. Condition No.16, penalizes a tenderer, if he fails to execute the agreement within the stipulated time. Condition No.29 invites disqualification and blacklisting, in addition to forfeiture of EMD, in the event of the tenderer fails to fulfill the conditions. It was always open to the Corporation to invoke any of its powers under the clauses referred to above, provided, the circumstances warrant. The petitioner never withdrew from his tender. He has only clarified his stand, that too, with reference to the practice followed by the Corporation, till the previous year. Though the petitioner submitted two representations, at the two stages of negotiations, the Corporation did not care to respond, or make its stand clear. In fact, the petitioner was entitled to draw an

inference that since his representations were not negatived, the stand put forth by him is accepted, by the Corporation.

The record discloses that for the first time, the Corporation referred to the representations made by the petitioner, after the contract was awarded. Even at this stage, it did not indicate, as to how the view put forth by the petitioner is untenable. The discretion retained by the Corporation for accepting, or rejecting tenders, cannot be permitted to be used in arbitrary, unreasonable and illegal manner. Such a course would be in fact, antithetical to the concept of reasonableness and fair play, in the matter of distribution of largesse. As pointed out earlier, there was scope for ambiguity in understanding the purport of the heading of System II, in the tender form, and in fact, the petitioner was not alone in this regard.

Having cancelled the contract that was awarded to the petitioner, forfeiting the EMD and blacklisting the petitioner, the Corporation awarded the contract, on the same day, in favour of the third respondent. The basis of awarding the contract, in favour of the third respondent, was the rates in System I. Operating System I and System II, simultaneously, leaves any amount of gray area, in the matter of exercise of discretion. Though this Court cannot go into the legality of exercise of the same, this much can be said that the desired level of objectivity cannot be ensured, by keeping such options open.

The irrelevance of the rates quoted in the tender is demonstrated by the award of the contract to the third respondent, who quoted Rs.505/-, as against Rs.7/- quoted by the petitioner for 16 K.Ms. in System II, and Rs.10/- as against Rs.4-10 ps. for System I. Once the Corporation has discarded the rates for System II, it could have very well given an opportunity to the petitioner to offer his figures for System I during the negotiations. If, in that process, the third respondent or any other person emerged as the lowest bidder, no exception could have been taken to the denial of contract to the petitioner.

One more aspect of the matter is that if the Corporation found that any punitive action needs to be taken against the petitioner, it ought to have followed the principles of natural justice and issued notice to him, be it in the matter of cancellation of contract, forfeiture of EMD, or blacklisting him from participating in future. The only basis for the Corporation to pass the order dated 18.08.2005, was the representation made by the petitioner. If it was not satisfied about that representation, at the most, it could have rejected the same. For any further action, it was under obligation to put the petitioner on notice about the steps, proposed to be taken by it. The representation submitted by the petitioner cannot relieve, the Corporation from its obligation to issue notice, before invoking the punitive clauses.

Therefore, this Court does not find any basis for the Corporation either in ignoring the representations dated 16.7.2005 and 23.7.2005, before it awarded the contract, through proceedings dated 29.7.2005, or in issuing the proceedings dated 18.08.2005. However, the contract awarded in favour of the third respondent cannot be disturbed, at this stage. To ensure transparency and fairness in the matter, the Corporation can be directed to undertake further negotiations with the petitioner and other tenderers, under System I, while keeping the existing contract in force, till such a step is taken.

For the foregoing reasons,

a. the writ petition is allowed, and the order dated 29.7.2005 and proceedings dated 18.8.2005 issued by the Corporation are set aside. The forfeiture of EMD and blacklisting of the petitioner stand set aside.

b. The Corporation shall undertake negotiations with the petitioner, third respondent and other intending tenderers for the rates under System I, duly intimating the date of such negotiations, which shall be within three weeks from today.

c. In case, the third respondent emerges as the successful bidder, the existing contract in his favour shall be continued. On the other hand, if any third party, or the petitioner, emerges as the successful bidder, the Corporation shall take appropriate decision in the matter, within

two weeks, thereafter.

There shall be no order as to costs.

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(L.NARASIMHA REDDY, J)

Dt: .10.2005

NOTE: L.R.copies be marked.

(B/o)

PAN